

The Federal Power Act's Federalism(s)

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FPA's purposes, structure and language

- Primary purpose was to close the *Attleboro* gap – i.e., to regulate activities and transactions which states lack authority to regulate.
- “Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific rather than a legalistic or governmental test.” *Connecticut Power & Light Co. v. FPC*, 324 U.S. 515, 529 (1945).
- In providing for federal regulatory authority the language of the statute is often open ended, but also is attentive to respecting and preserving some state authority.

Federal Authority Under the FPA

- **Direct authority** (wholesale sales):
 - E.g., 201(b) of FPA delegates to FERC jurisdiction over the “transmission of electric energy in interstate commerce” and the “sale of electric energy **at wholesale** in interstate commerce”
- **Remedial authority** (“practices ... affecting”):
 - Section 205 of the FPA provides that all rates charged by any public utility “in connection with the . . . sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates and charges” are required to be “just and reasonable.” This includes actual rates for wholesale power supply sales (which are jurisdictional under section 201) and “classifications, practices, and regulations affecting such rates and charges.”
 - Section 206 of the FPA further obligates FERC to fix “just and reasonable” rates whenever it finds that a rate collected by a public utility for any sale subject to the jurisdiction of the Commission, or “any rule, regulation, practice, or contract” is “unjust, unreasonable, unduly discriminatory or preferential.”
- **No authority** (savings clauses):
 - E.g., 201(b): FERC “shall not have jurisdiction ... over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.”

Modalities of Federalism

- **Exclusive Jurisdiction** (i.e., “bright line” jurisdiction, or “exclusive sovereignty”)

v.

- **Concurrent Jurisdiction** (what I will call “shared sovereignty”)

The Rise of the Exclusive Jurisdiction

- Congress “has given plenary authority ... to regulate extensions of gas transportation facilities and their physical connection with those of distributors, as well as the sale of gas to them.....”

Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 510 (1942) (under 7(a)(c) of the NGA, which gives federal regulators CCN authority).

- “Congress interpreted that case [*Attleboro*] as prohibiting state control of wholesale rates in interstate commerce for resale.”

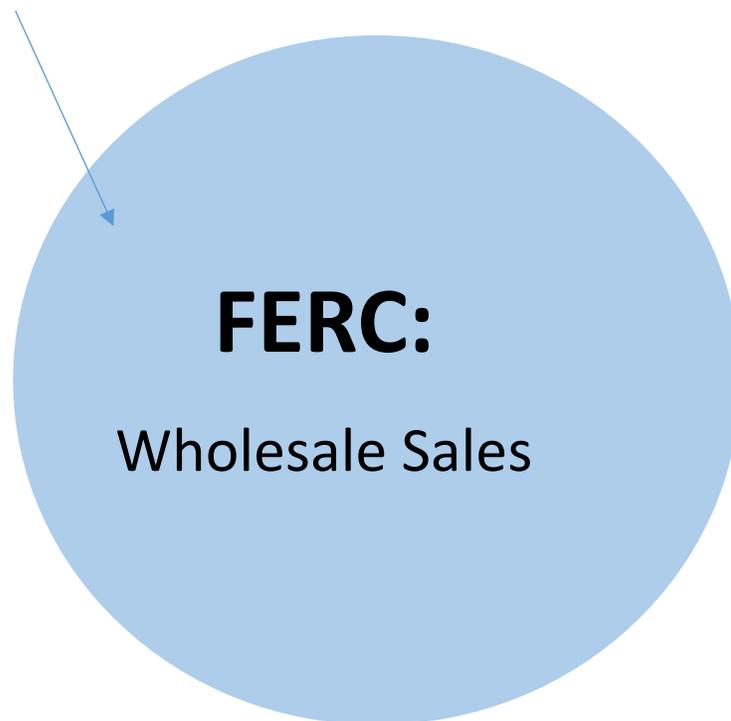
U.S. v. Public Utilities Comm’n of California, 345 U.S. 295, 308 (1953) (powers given under Part II extend to Part I).

A Jurisdictional “Bright Line”

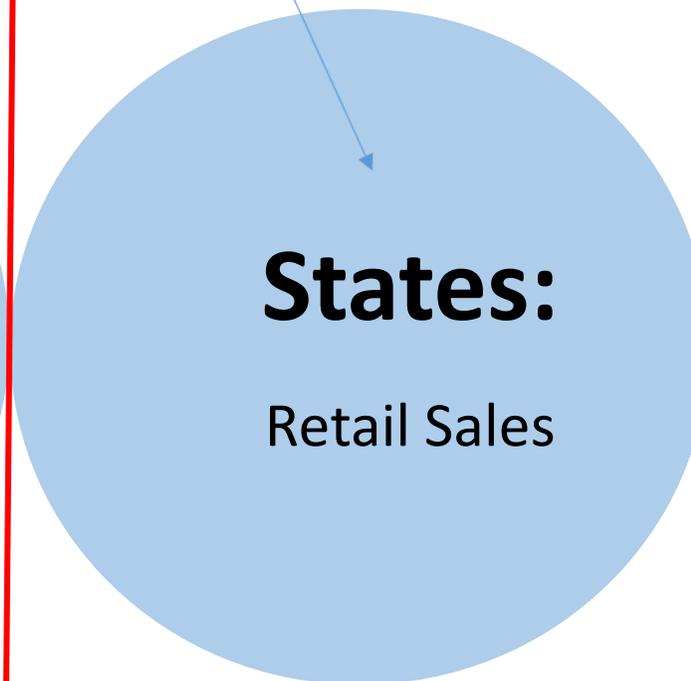
- “Congress meant to draw a **bright line easily ascertained**, between federal and state jurisdiction, making unnecessary [] case-by-case analysis [of conflicts]. This was done in the Power Act by making FPC jurisdiction **plenary** and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the states.” (emphasis added)
FPC v. Southern California Edison, 376 U.S. 205, 215-16 (1964).
- “FERC clearly has **exclusive jurisdiction** over the rates to be charged [] interstate wholesale customers. . . .” (emphasis added)
Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986) (noting “plenary” FERC jurisdiction over interstate wholesale rates, but preserving some state role in evaluating the prudence of purchased power decisions).

Exclusive Jurisdiction – “Bright Line”

Field Preemption (e.g., *Nantahala*)
-Wholesale Capacity Prices? 3rd/4th
Circuits



Savings Clauses (e.g., 201(b))
-Demand Response? D.C.
Circuit (relied on 201(a))



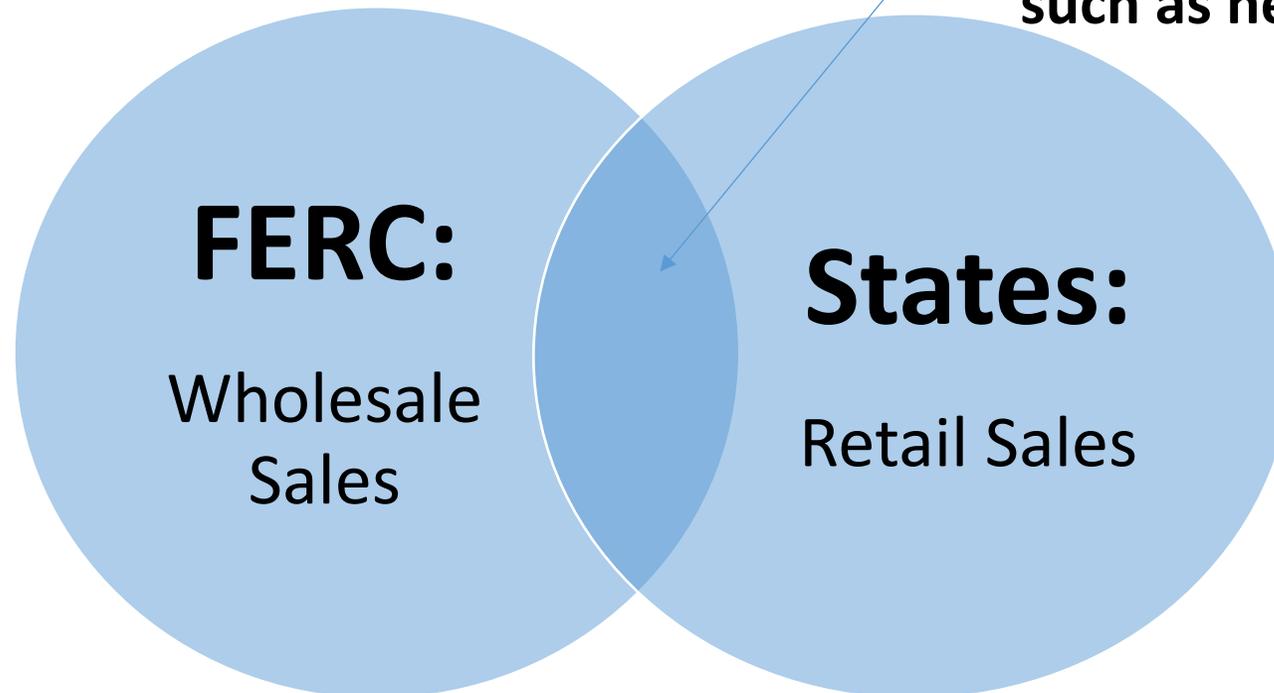
Post Restructuring Cases – Concurrent Jurisdiction as a form of “Shared Sovereignty”?

- Changes in the landscape of the electric industry since the New Deal have called into question whether the electricity universe is “neatly divided in spheres of retail versus wholesale sales.” ***New York v. FERC***, 535 U.S. 1, 16 (2002) (quoting D.C. Circuit opinion below).
- Majority opinion in *ONEOK* calls the quest for a “clear division between areas of state and federal authority” a “Platonic ideal” that does not describe modern natural gas markets. ***ONEOK, Inc. v. Learjet, Inc.***, No. 13-271, slip op. at 13 (Apr. 21, 2015) (Justice Breyer, joined by justices Kennedy, Ginsburg, Alito, Sotomayer & Kagan).

Concurrent Jurisdiction – “Shared Sovereignty”

Demand response or
capacity incentives?

Other state incentives,
such as net metering?



Legislative Support for Concurrent Jurisdiction

- “The new title II of the act is designed to secure coordination on a regional scale of the Nation’s power resources and to fill the gap in the present State regulation of electric utilities. **It is conceived entirely as a supplement to, and not a substitute for, state regulation.**” (emphasis added)
Hearings on H.R. 5423, House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., 384 (statement of FPC Commissioner Clyde Seavey in support of original bill) (emphasis added).
- “Subsection (a) . . . declares the policy of Congress to extend [] regulation to those matters which cannot be regulated by the State **and to assist the States in the exercise of their regulatory powers . . .**” (emphasis added)
Sen. Rep. No. 621, 74th Cong. 1st Sess. (Report of Senate Committee on Interstate Commerce).
- “The bill . . . contains provisions authorizing the Federal Commission **to aid the State commissions** in their efforts to ascertain and fix reasonable charges. . . . The new parts are so drawn as to be **a complement to and in no sense a usurpation of State regulatory authority . . .**” (emphasis added)
H.R. Rep. No. 1318, 74th Cong, 1st Sess, 7, 8, 27 (Report of House Committee on Interstate and Foreign Commerce).

Precedents Supporting Concurrent Jurisdiction

- “once a company is properly found to be a ‘public utility’ under the Act the fact that a local commission may also have regulatory power does not preclude exercise of the Commission’s functions.”
Connecticut Light & Power Co. v. FPC, 324 U.S. 515, 533 (1945).
- Even though FPC “lacks authority to fix rates for direct industrial sales, [it] may take those rates into consideration when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction.”
FPC v. Conway Corp., 426 U.S. 271, 281-82 (1976)
- *New York v. FERC; ONEOK v. Learjet.*

Constraining Principles for Concurrent Jurisdiction?

There are still some legal constraints on FERC:

- *Attleboro* gap is not fixed, but pragmatic objectives in regulating wholesale markets may require some federal action – even in areas FERC did not regulate in 1935 and that states themselves regulate. *New York v. FERC*.
- Language of FPA still constrains FERC “practices . . . affecting” under 205/206.
- Other express language, such as savings clauses.

Conclusions

- Outside of a few areas where jurisdiction is exclusive, Congress delegated to FERC discretion to meet statutory objectives by adapting its federalism approach to market conditions.
- FPA's framework continues to provide a powerful framework for addressing challenges in modern power markets in large part because it does not endorse or favor a particular federalism model.